Opinion

Untold Power Meets Unheralded Resolve: The Latest Machinations Over Lead Paint in California

DAVID ROSNER

IN A PREVIOUS COLUMN I NAIVELY REPORTED THAT A HUGE important public health court case was nearly won: the California State Court of Appeals had upheld the decision of a lower court making ConAgra, NL Industries, and Sherwin Williams, 3 producers of lead pigment, responsible for cleaning up the mess they had created.¹ These companies had produced virtually all the lead pigment that went into paint for the first half of the last century and by promoting the distribution of lead paint, a neurotoxin, across broad swaths of the state had created a huge environmental threat to millions of children. The court upheld a lower court decision that ordered the companies to pay from \$600 million to \$1.15 billion to the cities of San Francisco, Los Angeles, San Diego, and Oakland and a few other communities to create a fund to remove lead from city walls. It appeared that only one more legal hurdle needed to be overcome to finally end childhood lead poisoning, arguably the longest lasting pediatric epidemic in American history: the California Supreme Court's decision to hear or deny the appeal by the companies. Because I have been involved in this broad legal effort for 2 decades, I was elated but apprehensive.

My colleagues and I expected that the Supreme Court would take at least 1 or 2 years to reach a decision (after all, the Court of Appeals had taken nearly 5 years to come to theirs), but in late January, only a few weeks after the Appeals Court denied the companies' appeal, the Supreme Court again reaffirmed the lower court ruling! Yes, you might think, the legal team and all of us who had spent a significant portion of our lives researching the history of lead and providing expert testimony in endless depositions and in court had won what is among the largest environmental health lawsuits in history. We had established the viability of legal arguments grounded in the basic public health

principle that companies could be held accountable for *preventing* damages, not just paying for the costs of those already injured.

But the industry was willing to do quite a bit to undercut the court's decision. When the appeals had been filed, the companies established a multimillion dollar fund to be used to promote a ballot initiative that, in the words of the *Los Angeles Times*, would "allow three of the nation's biggest paint companies to hand California taxpayers a bill for the costs of cleaning up health hazards caused by lead paint." The companies set up this fund to gather over half a million signatures to put on the November ballot an initiative they deceptively titled the "Healthy Homes and Schools Act," which they described in an 8-page single-spaced document. According to one of the lead attorneys for the state, the initiative would "cut the heart out of the cities' and counties' legal victory" by declaring that lead paint is not a "public nuisance" and making the state taxpayers responsible for the costs of a clean-up, not the companies.

As the *Los Angeles Times* pointed out shortly after the bond issue was filed with the state:

It's written to apply to "all cases pending on, pending on appeal on, or filed after, November 1, 2017, and to any injunctions, judgments, or other remedies issued in those cases." The Court of Appeal didn't uphold the original lead paint judgment until Nov. 14, so it would be subject to the initiative. The initiative also would prevent any other counties or cities from bringing similar lawsuits against the paint manufacturers.²

Californians would have to search through the 8 pages of "Healthy Homes" to find the few lines that legally would have removed responsibility from the companies.

Luckily, many newspapers in the state and the attorney general were on to them. The *Los Angeles Times* published scathing articles revealing the efforts of the companies to avoid their responsibilities and media outlets around the country added their voice. One headline screamed, "Lead paint companies are trying to stick taxpayers with their cleanup bill,"² and another announced, "Paint companies could hand taxpayers the bill for hazardous lead paint cleanup under proposed California ballot measure."³ Yet another website headlined its piece "Paint companies brazen scheme to get Californians to pay for their crimes."⁴

The public attention to the companies' efforts led Xavier Becerra, California's attorney general, to intervene. Becerra, who has the statutory

authority to name ballot initiatives so that they inform voters, renamed the initiative as a bond issue that “Eliminates Certain Liability For Lead-Paint Manufacturers.” Of course, the companies will likely appeal his decision to rename the ballot initiative. And it is suspected that the companies will try to appeal California’s decision to the US Supreme Court.

An 18-year struggle in the State of California on behalf of children has been nearly destroyed numerous times by companies intent on protecting their financial interests. For nearly 2 decades, efforts to force the companies to clean up the mess have worked their way through the court system, while the companies’ resistance has left hundreds of thousands of California’s children at risk of poisoning. This century-old epidemic has been tragic for the affected children and families. And the California case is emblematic of this country’s all-too-frequent national struggles between social justice and political power—in this instance, a struggle that allows our children to be poisoned in their homes as well as slaughtered in their schools.

References

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Disclosure: David Rosner appeared as an expert witness in the lead lawsuit referred to (*State of California v National Lead*) in July 2013. He and Gerald Markowitz presented the historical evidence for the state. See

http://www.huffingtonpost.com/david-rosner/how-to-end-lead-wars-in-america_b_4590931.html for an earlier statement.

Address correspondence to: David Rosner, Columbia University Mailman School of Public Health, 722 West 168th St, Rm 934, New York, NY 10032 (email: DR289@columbia.edu).